Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1994

SIPCO, INC. and MONFORT, INC.,

Petitioners,

v.

FRED G. JENSEN, JAMES J. MONAHAN, WALTER C. CLARK, and RICHARD F. KRIEGLER, on behalf of themselves and others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

If official plan documents reserve an employer's right to change or terminate salaried retiree medical benefits, should the employer be forced to provide unchanged benefits for life, based on promises and representations of policy?

RULE 29.1 LISTING

When suit was initiated in July 1989, the parent company of Petitioner SIPCO, Inc. was ConAgra, Inc. In July 1989 SIPCO, Inc. had no subsidiaries other than wholly owned subsidiaries. SIPCO, Inc. is no longer doing business.

The parent company of Petitioner Monfort, Inc. is ConAgra, Inc. Monfort, Inc. has no subsidiaries other than wholly owned subsidiaries.

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FRED G. JENSEN, JAMES J. MONAHAN, WALTER C. CLARK, and RICHARD F. KRIEGLER, on behalf of themselves and others similarly situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioners SIPCO, Inc. and Monfort, Inc. respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in this case on October 13, 1994.

OPINIONS BELOW

The opinion of the court of appeals is reported at 38 F.3d 945 (8th Cir. 1994), and is reproduced in the Appendix to this Petition at App. 1-17.

The opinion of the district court is reported at 867 F.Supp. 1384 (N.D.Iowa 1993), and is reproduced in the Appendix to this Petition at App. 18-49.

JURISDICTION

The court of appeals entered judgment on October 13, 1994. Petitioners' motion for rehearing and suggestion for rehearing en banc were denied on November 18, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTE INVOLVED

The statute involved is the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §§1001 *et seq.* (ERISA), and in particular the following provisions:

> The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program . . . established or maintained by an employer or by an employee organization . . . for the purpose of providing for its participants or their beneficiaries . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment
>
> * * *
>
> 29 U.S.C. §1002(1)

This part [ERISA, Title I, Part 2, Participation and Vesting] shall apply to any employee benefit plan . . . other than –

(1) an employee welfare benefit plan

* * *

29 U.S.C. §1051(1)

(a) Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . .

* * *

29 U.S.C. §1053(a)

(a)(1) Every employee benefit plan shall be established and maintained pursuant to a written instrument.

* * *

29 U.S.C. §1102(a)(1)

(b) Every employee benefit plan shall –

(3) provide a procedure for amending such plan. . . .

29 U.S.C. §1102(b)(3)

STATEMENT OF THE CASE

In July 1989, Respondents, four salaried retirees, filed an ERISA class action against their former employer, Petitioner SIPCO Inc. (SIPCO), and its sister company,

Petitioner Monfort, Inc. (Monfort), which administered SIPCO retiree medical plans. The retirees sued on behalf of a class of 800 SIPCO salaried retirees and dependents, seeking to prohibit SIPCO and Monfort from changing or terminating medical benefits during class members' lifetimes.

The impetus for the class action was Petitioners' insertion of reservation of rights language into summary plan descriptions (SPDs) for SIPCO retiree medical plans. Unlike the SPDs, the formal or official documents for the retiree medical plans and for the trust funding the plans had at all times contained language reserving the employer's right to amend or terminate benefits.

Reservation of rights provisions in the plan and trust documents read as follows:

> **ARTICLE XVI**
>
> **Power of Amendment**
>
> 1. The Board of Directors of the Company shall have the right and power to alter, amend, or annul any of the provisions of this pensioner medical plan. . . .
>
> * * *
>
> **ARTICLE XII**
>
> **Power of Amendment**
>
> 1. The pension board of the Company shall have the right and power to alter, amend, or annul any of the provisions of this medical plan for salaried pensioners. . . .
>
> * * *

ARTICLE IX-1

Amendment

This trust agreement may be amended from time to time by the corporation. . . .

* * *

The SPDs for the retiree medical plans were silent on two issues. First, they did not mention SIPCO's reserved rights to amend or terminate retiree medical benefits. Second, the SPDs did not promise the retirees lifetime benefits.

In addition to reservation of rights language in the plan and trust documents, the record contains evidence extrinsic to the plans, which is largely undisputed. The evidence includes the following:

- testimony by a former SIPCO benefits manager about SIPCO's policy of providing lifetime retiree medical benefits; as well as her letters to the IRS and to a former SIPCO vice president concerning the possibility of terminating retiree medical plans

- testimony by a former SIPCO president and CEO, John Copeland (the credibility of whose testimony about SIPCO has been placed in doubt recently in *Esmark, Inc. and United Food and Commercial Workers Int'l Union*, 315 NLRB No. 108 (1994)), concerning SIPCO's intent to continue Swift's policy of "vesting" medical benefits

- a prospectus and merger agreement entered into when SIPCO was sold in 1986, providing

that retiree medical plans were to be maintained for three years; as well as testimony by the purchaser's negotiator to that effect

- an outside actuary's concern that Petitioners would have difficulty in reducing retiree benefits because of SPD language

- testimony by class members about promises of lifetime medical benefits made to them at their retirements, or decades earlier at employment interviews by SIPCO's predecessors

- prior changes to a retiree medical plan, implemented without objection

None of the oral or written extrinsic evidence listed above was incorporated into the plan documents. The documents did, however, include reservation of rights language.

Following a December 1991 trial, the district court entered findings of fact and conclusions of law and an order on August 6, 1993. Final judgment was entered August 13, 1993.

The court held that omitting reservation of rights language from the SPDs violated ERISA by being both a material misrepresentation and a breach of fiduciary duty. Concluding also that the retiree class had relied on the silent SPDs, the court held Petitioners equitably estopped from using their reserved rights, prohibited them from changing retiree medical benefits, and ordered them to provide the class with unchanged medical benefits for life.

The judgment was appealed to the Eighth Circuit Court of Appeals on September 2, 1993. On October 13, 1994, the court of appeals issued an opinion and judgment in favor of the retiree class. Petitioners' motion for rehearing and suggestion for rehearing en banc were denied on November 18, 1994.

Although ultimately affirming the district court's judgment, the Eighth Circuit opinion disagreed specifically with most of its holdings. First, expressly opposing the district court's fundamental holding, the appellate court concluded that ERISA does not require SPDs for welfare plans to disclose that welfare benefits are not vested benefits. Following from its initial conclusion – and again contrary to the lower court's holding – the Eighth Circuit held that Petitioners' failure to disclose in the SPDs their reserved rights to amend or terminate benefits was neither a material misrepresentation nor a breach of fiduciary duty. The appellate court also held that the silent SPDs did not equitably estop Petitioners from relying on their reserved rights (assuming without deciding the propriety of applying estoppel under ERISA). The Eighth Circuit concluded additionally that an employer's affirmative promise to provide vested welfare benefits must be incorporated into the formal written ERISA plan documents (which would include the SPDs).

The Eighth Circuit affirmed the lower court's judgment by relying on some of the extrinsic evidence – mainly oral – outlined above. None of the extrinsic evidence supporting the court's conclusion was incorporated into the formal plan documents or into the SPDs.

Despite the fact that the plan documents contained no promises of vested benefits, the court concluded that SIPCO intended for medical benefits to vest at retirement. It employed two separate rationales to do so.

First, the court found that reservation of rights language in the plan documents was "not facially unambiguous," or "not free of ambiguity." The court failed to explain or support its nebulous holding, merely concluding either that changes in medical benefits were intended to be prospective only, or that SIPCO had relinquished its power to modify benefits for retirees. Second, the Eighth Circuit gave weight to oral testimony on the following subjects: promises of lifetime benefits; the intent of SIPCO's predecessor (Swift) to vest salaried retiree medical benefits; and SIPCO's intent to continue that practice. However, the court gave no weight to the following documentary evidence, which it had not found ambiguous: a prospectus and merger agreement establishing SIPCO's purchaser's right to terminate retiree medical benefits after three years; written intra-company communications concerning the possibility of retiree medical benefit plan termination; and a written communication with the IRS concerning the same possibility.

REASONS FOR GRANTING REVIEW

I. Introduction

The Supreme Court should grant review of the Eighth Circuit's decision for three reasons. First, finding an intent to vest welfare benefits in disregard of a reserved rights provision creates an intolerable conflict

with other circuit decisions indistinguishable from this one. Second, allowing this decision to stand violates ERISA's statutory prohibitions against permitting informal amendments to employee benefit plans and against vesting welfare benefits. Third, this case presents a companion issue to that presented by *Schoonejongen v. Curtiss-Wright Corp.*, which is presently pending before the Supreme Court.

II. The Eighth Circuit's Determination that Benefits are Vested Here Conflicts with Decisions Relying on Employers' Reserved Rights to Amend or Terminate Benefits

The present case is no different from all others in which salaried retirees have been denied unchanged medical benefits for life. However, the holding of *Jensen v. SIPCO* – that salaried retiree medical benefits are vested – is in direct conflict with a body of settled authority.

Appellate courts throughout the circuits (including the Eighth Circuit here) hold that retiree medical benefits, which are ERISA welfare benefits, are not vested. *See* 29 U.S.C. §§1002(1), 1051(1) and 1053(a). Since welfare benefits do not automatically vest, they may be changed or terminated if an employer has reserved its right to do so. Accordingly, the issue of the significance of reservation of rights provisions arises in cases dealing with welfare benefits.

Because welfare benefits do not vest, appellate courts draw the conclusion that language in formal plan documents reserving an employer's right to change or discontinue such benefits is paramount. Therefore, a reservation

of rights provision will override written and oral communications and representations to the contrary. *See, e.g., Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, 855-56 (4th Cir. 1994); *Alday v. Container Corp. of Am.*, 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675 (1991); *Musto v. American Gen. Corp.*, 861 F.2d 897, 907 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745 (1989); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 491 (2d Cir. 1988).

The following reservation of rights provisions are typical of those having been held sufficient to uphold an employer's right to terminate or modify retiree medical benefits:

- This Policy may be amended or discontinued at any time . . . without the consent of or notice to any [plan participant].

Gable v. Sweetheart Cup Co., Inc., 35 F.3d at 856.

- The Company reserves the right to alter, amend, delete, cancel or otherwise change the Plan or any of the provisions of the Plan at anytime [sic].

Wise v. El Paso Natural Gas Co., 986 F.2d 929, 933 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 196 (1993).

- [Plan administrators reserved the right to] terminate, suspend, withdraw, amend or modify the Plan in whole or part at any time.

Alday v. Container Corp. of Am., 906 F.2d at 662.

- The Group Policy, or any insurance coverage thereunder, may be amended or discontinued at any time.

- The Company fully intends to continue the Plan indefinitely and to meet any foreseeable situations that may occur. However, the Company does, as it always has, reserve the right to change the Plan and, if necessary, discontinue it.

Musto v. American Gen. Corp., 861 F.2d at 903-04.

- The Company reserves the right at any time to change or discontinue this Supplementary Medical Expense Plan.

Moore v. Metropolitan Life Ins. Co., 856 F.2d at 490.

No appellate court has held the language quoted above ambiguous. However, the Eighth Circuit held the language of Petitioners' reserved rights provisions, which are substantially identical to the quoted provisions, "not facially unambiguous," or "not free of ambiguity." *See* above at 4-5.

In addition to its similar reserved rights provisions, this case is typical of the other salaried retiree medical benefit cases Petitioners cite; nothing evidentiary distinguishes it. However, in many respects *Jensen v. SIPCO* appears closest to *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, in which the Supreme Court denied certiorari in October 1993. *See* ___ U.S. ___, 114 S.Ct. 196 (1993).

To Petitioners' knowledge *El Paso Natural Gas Co.* is the first opinion considering the legal significance of silent SPDs. The case is also analogous to the present case because of the identical circumstances leading to litigation, *i.e.*, a purchaser's issuance of SPDs containing reserved rights language for the first time. The *El Paso*

Natural Gas Co. record even contains evidence of an actuary's concern for possible problems with prior silent SPDs – evidence discounted as legally irrelevant by the Fifth Circuit yet given weight by the Eighth Circuit. *Id.* at 933.

The Fifth Circuit denied the retirees' claim for lifetime benefits in *El Paso Natural Gas Co.* In so doing, the court stressed that any participant's right to a fixed level of benefits must be "found in the plan documents and must be stated in clear and express language." *Id.* at 937. Because nothing in the plan documents granted the retirees that right, the Fifth Circuit held they were not entitled to lifetime medical benefits. Although the plan documents in the present case also do not contain language granting the *Jensen* retirees a fixed level of benefits, the Eighth Circuit held nonetheless that they were entitled to lifetime medical benefits.

Jensen v. SIPCO is not similar only to *El Paso Natural Gas Co.*; it is virtually indistinguishable from other retiree medical benefit cases, all of which deny salaried retirees' claims. For example, *Alday v. Container Corp. of Am.*, 906 F.2d 660, concerns a salaried retiree class seeking unchanged medical benefits for life. As in *Jensen v. SIPCO*, the plan documents reserved the employer's right to amend or terminate. The record also contained various written communications not mentioning the employer's reserved rights. *Id.* at 665.

The Eleventh Circuit declined to consider the informal letters and booklets. Holding that the rights reserved to the employer in the plan documents must control, the

court affirmed summary judgment for Container Corp. of America. *Id.* at 666.

A salaried retiree class is involved too in *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488. The record in *Metropolitan Life Ins. Co.* contains some representations of lifetime benefits made to the retiree class. Mirroring the present case, the record also contains evidence that the plans had been changed previously without protest. *Id.* at 490.

As did all other circuits – except the Eighth Circuit here – the Second Circuit gave no weight to the promises of lifetime benefits. It concluded instead that the specific language of the plan documents governed. Therefore, the court denied the retirees their request for lifetime benefits, holding that reserved rights in the plan documents would supersede any communications describing the plan as providing lifetime benefits at no cost.

Salaried retirees also brought a class action in *Musto v. American Gen. Corp.*, 861 F.2d 897. Once again, the record contains language reserving the employer's right to modify or terminate retiree benefits, as well as "unofficial" documents that the retirees claimed promised them free medical insurance for life. *Id.* at 902-05, 907. As does the record in this case, the record includes testimony from a retired vice-president about lifetime benefits. *Id.* at 909 n.8. The Sixth Circuit held that the written plan document, which included the employer's reserved rights, controlled over any other communications. *Id.* at 910. Accordingly, lifetime medical benefits were denied.

The recent case of *Gable v. Sweetheart Cup Co., Inc.*, 35 F.3d 851, applies the same reasoning to similar facts. The

Fourth Circuit affirmed summary judgment for Sweetheart Cup, allowing it to decrease retirees' medical benefits. Based mainly on an express reservation of rights found in the plan documents, the appellate court discounted the retirees' claim that their benefits had vested at retirement. The court also refused to give weight to informal communications ("Schedule II documents") promising lifetime benefits. *Id.* at 857. It disagreed as well with the retirees' argument – one advanced in the present case and accepted without explanation as the Eighth Circuit's conclusion – that any changes were for active employees only. *Id.* at 856-57.

That this is not a unique or fact-bound case is obvious. It is simply a factual amalgam of other salaried retiree medical benefit cases in the Second, Fourth, Fifth, Sixth and Eleventh Circuits. Its record contains similarities to evidence discussed in the other opinions, including the following: similar language in the plan documents reserving an employer's rights to amend or terminate (found "not facially unambiguous" only in this case); subsequent purchase of a company; promises of lifetime benefits made to retirees decades earlier; actuarial concerns; prior plan changes implemented without objection; and executives' representations of lifetime benefits.

The present case differs only in its reasoning and disposition, both of which are in intolerable conflict with those of the Fifth Circuit in *Wise v. El Paso Natural Gas Co.*, and with those of the other appellate courts cited. The Supreme Court should grant certiorari to resolve the conflict.

III. The Negative Consequences of this Decision Are Far Reaching

The Eighth Circuit issued more than an aberrant opinion declining to follow settled authority when it decided *Jensen v. SIPCO*. Because of the nature and result of the decision, this case will not disappear or self-correct. To the contrary, as it is written the opinion provides unintended avenues for informally amending plan documents and for vesting welfare benefits.

Allowing the decision to become precedent has both legal and economic consequences. The obvious consequence is the litigation that will ensue because of the opinion: *Jensen v. SIPCO* has opened the door to those attempting to obtain retiree medical benefits in spite of employers' reserved rights. More broadly, however, the law concerning salaried retiree medical benefits – and perhaps welfare benefits in general – will move in an improper direction.

By being able to be circumvented, ERISA's statutory scheme will be adversely affected. 29 U.S.C. §1102(a)(1) mandates that all employee benefit plans be "established and maintained pursuant to a written instrument." The written instrument must describe formal plan amendment procedures to be followed. 29 U.S.C. §1102(b)(3). Therefore, appellate courts agree (mainly through rejecting estoppel arguments) that informal oral or written representations or communications are legally insufficient to amend an employee benefit plan. *See, e.g., Coleman v. Nationwide Life Ins. Co.*, 969 F.2d 54 (4th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1051 (1993); *Rodrigue v. Western and S. Life Ins. Co.*, 948 F.2d 969 (5th Cir. 1991);

Cefalu v. B.F. Goodrich Co., 871 F.2d 1290 (5th Cir. 1989); *Miller v. Coastal Corp.*, 978 F.2d 622 (10th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1586 (1993); *Nachwalter v. Christie*, 805 F.2d 956 (11th Cir. 1986).

Should the reasoning in this case be used as future authority, employee benefit plans will be able to be amended easily: not, as ERISA requires, through formal amendment procedures and written amendments incorporated into the official plan document, but rather by informal communications and representations outside the plan. The plan amendments permitted by the Eighth Circuit in *Jensen v. SIPCO* violate ERISA.

Furthermore, ERISA has specifically excepted welfare benefits from statutory vesting. *See* 29 U.S.C. §§1002(1), 1051(1), and 1053(a). If certiorari is denied in this case, future courts may hold welfare benefits vested merely on self-serving representations of policy and oral promises, neither of which need be included in the plan documents.

Second, the Supreme Court should consider the economic consequences on employers throughout the United States if the Eighth Circuit opinion becomes law. Employers' liability for post-retirement medical benefits is staggering at present. Although the value of retiree medical benefits in American private industry is impossible to measure accurately, earlier liability estimates have ranged from nearly $100,000,000,000 to five times that amount. Moreover, because of rapidly increasing medical costs, longer life spans, more sophisticated forms of treatment, and greater utilization of medical services, employers' liability continues to expand. *See* Paul J. Routh and Ronald A. Kladder, *Welfare Benefits Guide 1994*

§§7.01, 7.02 (1991-93) (citing in part 15 Pens. Rep. (BNA) 378 (1988); 15 Pens. Rep. (BNA) 676 (1988)).

An estimate of Petitioners' liability for a class of 800 retirees and dependents is necessarily imprecise. However, the trust established for retiree medical benefits, which at trial was found to be worth up to $8,000,000, is far from the amount needed to provide medical benefits for class members.

Furthermore, Petitioners are in the position of being forced to provide lifetime medical benefits for a group of individuals, many of whom have spent much of their working lives employed not by SIPCO or Monfort but by predecessor companies. Petitioners' position is far from unique, however. It is not uncommon for employers, as subsequent purchasers of companies, to have inherited retiree workforces and welfare benefit plans in which retirees are participants. Successor employers should not be bound by representations of policy and promises made decades earlier, often by predecessor employers once or twice removed.

Faced with daunting health care liability, employers must be allowed to rely on the rights reserved to them in formal welfare plan documents. ERISA entitles them to modify or terminate welfare benefits. As the Fifth Circuit has explained, employers should be permitted to do so:

> Across the nation, companies faced with rapidly rising costs and worried about their competitiveness are paring retiree benefits that were once considered sacrosanct. But ERISA simply does not grant employees unfettered rights to the corporate treasury. Employers need not

> abandon prudent business behavior when marketplace forces compel them to rethink earlier offers of contingent, non-vested benefits. In light of today's spiraling health care costs, cutbacks in government-sponsored health care coverage (Medicare), and our ever-aging population, Congress may enact changes. But the current ERISA requires no more.

See Wise v. El Paso Natural Gas Co., 986 F.2d at 937.

As equitable as the decision in *Jensen v. SIPCO* may have been for the retirees, ERISA does not grant the Eighth Circuit the right to have made it. The Supreme Court should grant certiorari to prevent the error from spreading.

IV. *Jensen v. SIPCO* Is the Converse of *Schoonejongen v. Curtiss-Wright Corp.*

The Supreme Court granted certiorari and on January 17, 1995 heard oral argument in *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d Cir. 1994), *cert. granted*, 115 S.Ct. 42 (Sept. 26, 1994) (No. 93-1935). *Curtiss-Wright* concerns a Third Circuit decision that barred an employer from terminating retiree health benefits because the plan lacked a detailed amendment procedure. The plan did, however, contain a reservation of rights clause.

The Supreme Court in future will address the type of specificity required in a welfare plan's amendment procedure when the plan contains an adequate reservation of rights provision. As far as Petitioners are aware, the Court has not addressed the converse issue: given a welfare plan's adequate amendment procedure, under what

circumstances – if any – may a reservation of rights provision be overridden to effectively amend the plan? The Supreme Court should do so by granting certiorari in this case.

CONCLUSION

For all reasons stated in this petition, Petitioners respectfully request that a writ of certiorari issue in this case to review the decision and order of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Counsel for Petitioners

Date: February 8, 1995

Fred G. JENSEN; James J. Monahan; Richard F. Kriegler; Walter C. Clark, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

SIPCO, INC.; Monfort, Inc., Defendants-Appellants,

No. 93-3223.

United States Court of Appeals,
Eighth Circuit.

Submitted April 13, 1994.

Decided Oct. 13, 1994.

Rehearing and Suggestion for Rehearing
En Banc Denied Nov. 18, 1994.

Retirees brought class action against employer and its sister company under Employee Retirement Income Security Act (ERISA), alleging entitlement to vested medical benefits under two medical benefit plans for salaried pensioners. The United States District Court for the Northern District of Iowa, Donald E. O'Brien, Senior District Judge, 867 F.Supp. 1384, entered judgment for retirees. Employer and sister company appealed. The Court of Appeals, Loken, Circuit Judge, held that employer intended to provide plaintiff class with vested retiree medical benefits, although doctrine of equitable estoppel did not provide basis for employees' claims.

Affirmed.

Sylvia Davidow, Houston, TX, argued for appellant (William Bruckner and Charles Sykes on the brief).

Steven P. DeVolder, Des Moines, IA, argued for appellee (James Hanks, P.L. Nymann, and Steven Kohl, Sioux City, IA, on the brief).

Before LOKEN, Circuit Judge, FRIEDMAN* and JOHN R. GIBSON, Senior Circuit Judges.

LOKEN, Circuit Judge.

This is a class action on behalf of eight hundred persons who retired from salaried positions at SIPCO, Inc. ("SIPCO"), on or before March 1, 1989. The Class claims that it is entitled to vested medical benefits under two Medical Benefit Plans for Salaried Pensioners adopted by SIPCO in the early 1980s. The district court[1] agreed and ordered SIPCO and its sister company, Monfort, Inc. ("Monfort"), to provide those benefits. SIPCO and Monfort appeal. The governing law is the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"). We conclude that SIPCO intended that its retiree medical benefits would vest when salaried employees retired. We therefore affirm.

I.

In April 1981, Esmark, Inc., a holding company, spun off the fresh meat operations of Swift & Company

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* The HONORABLE DANIEL M. FRIEDMAN, Senior United States Circuit Judge for the Federal Circuit, sitting by designation.

[1] The HONORABLE DONALD E. O'BRIEN, Senior United States District Judge for the Northern District of Iowa.

("Swift") to public shareholders. The new company became SIPCO. SIPCO immediately established Plan 1006, the Medical Benefit Plan for Salaried Pensioners. It covered salaried employees who retired from Swift or SIPCO after January 1, 1979 and were eligible for vested SIPCO pension benefits. SIPCO also established a Medical Benefit for Pensioners Trust to fund future retiree medical benefit payments under Plan 1006. Esmark contributed $6,200,000 to the Trust.

On January 1, 1984, due to increasing costs under Plan 1006, SIPCO created Plan 1017, which provided reduced medical benefits to salaried employees retiring after that date. Plan 1017 had a more restrictive eligibility requirement than Plan 1006 – twenty years service with Swift and SIPCO, instead of ten years. Those who had retired before 1984 continued receiving full Plan 1006 benfits.

In early 1986, SIPCO was acquired by an investment firm, CHS Holding II, Inc. In the merger agreement, CHS agreed to continue SIPCO's medical benefits plans for salaried pensioners for three years after the closing "on the same basis as presently in effect." In 1987, ConAgra, Inc., which owned Monfort, purchased a fifty percent interest in SIPCO. Monfort began administering SIPCO's pension plans and retiree medical plans in 1987. ConAgra acquired complete ownership of SIPCO in August 1988 and consolidated the two meat packing organizations under Monfort's management.

In an August 10, 1988 memorandum to management employees, the President of Monfort advised: "We will abolish the Sipco retiree health care plan for those who

have not retired prior to February 27 [later extended to March 1], 1989." In January 1989, SIPCO retirees received new Summary Plan Descriptions ("SPDs")[2] for Plans 1006 and 1017, which included an unsettling new disclosure:

> Keep in mind that the plan and trust documents are the controlling legal documents and you should rely solely on these provisions of the plan and the trust documents. **SIPCO, Inc. reserves the right to terminate, discontinue, alter, modify, or change this plan or any provision of this plan at any time.**

In April 1989, after the March 1 deadline for retiring with medical benefits, eligible retirees received an SPD for a new plan, Plan 1018, covering salaried employees who retired between January 1 and March 1, 1989. This SPD disclosed benefits changes from Plan 1017 and included the statement, "employer reserves the right to charge the employee/retiree a premium for this coverage. . . . "

A number of retirees protested these changes in the SPDs. When SIPCO did not respond, four retirees commenced this action against SIPCO and Monfort on behalf of the Class, seeking an injunction requiring defendants to provide the retiree medical benefits detailed in Plan 1006 and Plan 1017 "for life." In the district court (and on appeal), SIPCO defended on the ground that each formal

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[2] ERISA provides that SPDs "shall be furnished to participants and beneficiaries." SPDs "shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan." 29 U.S.C. § 1022(a)(1).

Plan document includes an unambiguous reservation of the right to unilaterally amend or terminate retiree medical benefits. For example, Plan 1006 provides:

> *ARTICLE XVI*
>
> *POWER OF AMENDMENT*
>
> 1. The Board of Directors of the Company shall have the right and power to alter, amend, or annul any of the provisions of this Pensioner Medical Plan, provided, however, that no such alteration, amendment or annulment shall permit any part of the Trust Fund, either corpus or income, to be used for or to be diverted to purposes other than for the exclusive benefit of the Employees or Participants or their beneficiaries.
>
> 2. An amendment shall become effective as of the date specified in the resolution adopting such amendment. Unless otherwise expressly provided therein, amendments shall not be applicable to persons who are receiving pensions hereunder prior to the effective date of such amendment.

Plan 1017 contains nearly identical language, and the Medical Benefit for Pensioners Trust contains provisions explicitly recognizing that the Plans it was created to fund may be modified or even terminated. Given these express Plan provisions, SIPCO argues, the Class has no right to vested retiree medical benefits.

Plaintiffs argue that the reservation-of-rights provisions in the Plans may not be given effect because the SPDs provided to employees and retirees prior to 1989 did not disclose that SIPCO may amend or terminate

retiree medical benefits. The SPD for Plan 1017, for example, disclosed only the following regarding benefits termination:

> **TERMINATION OF COVERAGE**
>
> **Children Who Marry or Reach Age 19 –**
>
> All coverage for children ceases on date of marriage or age 19, whichever occurs first.
>
> **Divorce of Spouse –**
>
> All coverage for the spouse ceases on the date of divorce.
>
> **Death of Pensioner –**
>
> Coverage for dependents continues for a period of 90 days following date of death and then ceases unless the spouse is to receive a survivors pension.

After a three day bench trial, the district court entered judgment in favor of the Class. It held (i) "that it was SIPCO's intention at pertinent times to provide each of plaintiffs' class members with lifetime benefits"; (ii) that SIPCO's failure to disclose its contrary reservation of rights in the pre-1989 SPDs was a material misrepresentation that equitably estops SIPCO from later exercising those rights; and (iii) that this failure to disclose was also a breach of defendants' fiduciary duties under ERISA. The court ordered that Class members who retired before 1984 receive the lifetime medical benefits described in the initial SPD for Plan 1006, and Class members who retired between January 1, 1984, and March 1, 1989, receive the lifetime benefits described in the initial SPD for Plan 1017 (thus invalidating Plan 1018). SIPCO and Monfort appeal.

II.

The core issue in this case is whether, when each Class member retired, his or her SIPCO retirement medical benefits were vested. ERISA requires that employee pension plans meet minimum vesting standards. *See* 29 U.S.C. § 1053. But vesting is not mandatory for "employee welfare benefit plans" – plans that offer benefits such as the medical benefits here at issue. *See* 29 U.S.C. §§ 1002(1), 1051(1). Therefore, an employer may unilaterally modify or terminate medical benefits at any time "absent the employer's contractual agreement to the contrary." *Howe v. Varity Corp.*, 896 F.2d 1107, 1109 (8th Cir.1990); *see also Meester v. IASD Health Servs. Corp.*, 963 F.2d 194, 197 (8th Cir.1992). Thus, the question is whether Plan 1006 and Plan 1017 conferred vested benefits on class members who retired under those Plans. Plaintiffs have the burden of proof on that issue. *See Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1516-17 (9th Cir.1988), *cert. denied*, 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989).

Because employee benefit plans must be established by a "written instrument," 29 U.S.C. § 1102(a)(1), any SIPCO promise to provide vested benefits must be "incorporated, in some fashion, into the formal written ERISA plan." *United Paperworkers Int'l Union v. Jefferson Smurfit Corp.*, 961 F.2d 1384, 1386 (8th Cir.1992). Therefore, our inquiry must begin with the written plan documents. SPDs are considered part of the ERISA plan documents. *See Alday v. Container Corp. of America*, 906 F.2d 660, 665 (11th Cir.1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991); *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir.1988).

When interpreting ERISA plan documents, the Supreme Court has referred us to, and explicated, the law of trusts:

> The terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is now inadmissible."

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 112, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989), quoting Restatement (Second) of Trusts § 4 cmt. d (1959). The question of what "other evidence" is admissible turns on the relative ambiguity of the plan provision being construed:

> That intent [of the settlor] is first sought by careful examination of the trust clause in question, giving the words in that clause their ordinary meanings. If the construction question cannot be resolved by reference to the clause alone, the court will examine the entire trust instrument to determine the creator's intent and purposes. . . . The third step becomes necessary when the intent or meaning of the settlor . . . cannot be determined by reference to the provisions of the trust instrument itself. Extrinsic evidence will be admitted by the court to assist it in determining the meaning and effect of the particular clause.

George G. Bogert, *The Law of Trusts & Trustees* § 182 (rev. 2d ed. 1979 & Supp. 1993) (footnotes omitted). *See also Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1353 (8th Cir.1980).

In this case, plaintiffs argue that the "TERMINATION OF COVERAGE" provisions in the Plan SPDs promised vested benefits when they stated that benefits *will be* provided until the retiree dies, or a spouse divorces, or a child marries or reaches age 19. We have previously noted that this type of provision supports an argument that retiree benefits are vested. *See Local Union No. 150-A, United Food & Commercial Workers Int'l Union v. Dubuque Packing Co.*, 756 F.2d 66, 69-70 (8th Cir.1985). However, these termination-of-coverage clauses are at most an ambiguous expression of an intent to vest retiree benefits; they can also be construed as dealing only with termination of coverage on an individual basis, not the separate questions of whether the Plan may be terminated or its benefit levels modified by SIPCO.

SIPCO relies exclusively on the Plan provisions permitting it to amend or terminate "any of the provisions of this Pensioner Medical Plan." SIPCO argues that this is an unambiguous declaration that retiree benefits are not vested. We agree that a reservation-of-rights provision is inconsistent with, and in most cases would defeat, a claim of vested benefits. *See Jefferson Smurfit*, 961 F.2d at 1385. But the question at this stage of the analysis is whether these provisions are so unambiguous as to make unnecessary any reference to other Plan provisions and extrinsic evidence. We think not. In the first place, the reservation-of-rights provisions are not facially unambiguous – they leave at least some doubt as to whether SIPCO intended to reserve the right to change or terminate benefits to already retired pensioners, or only the right to make prospective changes for those covered by the Plan but not yet retired. In the second place, "[t]he power to modify [a

trust] may be relinquished by the settlor." Bogert, *The Law of Trusts & Trustees* § 993, at p. 232. Whether a power has been relinquished obviously requires examination of extrinsic evidence, which the district court properly undertook.

When we look at the record beyond the reservation-of-rights provisions themselves, we find that SIPCO has nothing to offer. It did not include complete copies of Plan 1006 or Plan 1017 in the record on appeal, so we cannot study the entire document for evidence of the settlor's intent. And SIPCO presented virtually no extrinsic evidence at trial supporting its position. This is perhaps not surprising since the present SIPCO, managed by ConAgra and Monfort, is a very different organization than the SIPCO that created Plan 1006 and Plan 1017,

Plaintiffs, on the other hand, presented a wealth of extrinsic evidence supporting their contention that SIPCO intended that Plan 1006 and Plan 1017 medical benefits would vest when a Class member retired under either Plan. This largely undisputed evidence included:

1. In the 1970's, Swift provided vested retirement medical benefits to its salaried employees, benefits intended to be equal to or better than those provided to hourly employees under Swift's collective bargaining agreements. SIPCO intended to continue Swift's policy, and Esmark funded the Medical Benefit for Pensioners Trust to support that effort.

2. As the Plan names suggest, Plan 1006 and Plan 1017 were closely related to SIPCO's vested pension plans. Eligiblity requirements were the same. Beth Elkin, SIPCO's Manager of Employee Benefits in the early 1980s,

testified that, when employees asked her whether to choose a smaller "joint and survivor annuity" under the pension plan, "I would always point out to them that . . . it also provided lifetime medical benefits which could be in fact more valuable than the actual pension check."

3. Prior to March 1, 1989, all the changes SIPCO unilaterally made to its retiree benefits – most notably, the adoption of Plan 1017 – were prospective only. Beth Elkin testified that Plan 1017 was announced in advance "[t]o give people who were eligible for a pension a chance to decide whether they wanted to retire under the old medical benefits or if they wanted to continue working and retire under the new benefits." This policy of not changing the benefits of prior retirees is consistent with the concept of vested benefits. *See Allied Chemical & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 181 n. 20, 92 S.Ct. 383, 398 n. 20, 30 L.Ed.2d 341 (1971) ("[V]ested retirement rights may not be altered without the pensioner's consent.").

4. John Copeland began working for Swift in 1948 and became President and Chief Executive Officer of SIPCO when it was formed in 1981. Copeland testified that Swift provided vested medical benefits to salaried pensioners and that SIPCO intended to continue that policy when it adopted Plan 1006 and Plan 1017. Copeland was familiar with the SPDs for those Plans and knew they did not disclose a reservation of rights because "it wasn't our policy." He explained that Esmark contributed to the Pensioners Trust "for those people that were on entitlement rolls [already retired] and those that were

presently being transferred to our corporation." Copeland negotiated the merger with CHS. He pressed for the provision that CHS would not change the retirement medical plan for three years because "I was concerned that they would move the corporate headquarters, close other units and retire a lot of people and before they would do that they would change our retirement plan and our people would be subjected to much less benefits than they had anticipated."

5. SIPCO's former Regional Employee Relations Manager, who began working for Swift in 1951, testified that SIPCO continued Swift's policy concerning retirement medical benefits for salaried employees. It was part of this manager's responsibilities to communicate that policy to SIPCO salaried employees. He considered lifetime retirement medical benefits an "earned benefit" for any employee who was eligible for benefits under the Plan in effect when he or she retired. "[I]f they were eligible for a pension," he explained, "they would be entitled to pensioner's health insurance for the rest of their life."

6. Benefits manager Beth Elkin testified that she helped prepare the pre-1989 SPDs. She was aware that other companies had been sued because they inserted reservation-of-rights provisions in their SPDs. SIPCO intentionally declined to put such a disclosure in its SPDs for Plan 1006 and Plan 1017. "We were all aware of it. It did not apply to us, and we did not include the language."

7. In July 1988, an outside actuarial consulting firm opined that it would be "very difficult, if not impossible,

for SIPCO to unilaterally reduce benefits" for those who had previously retired.

Given this overwhelming extrinsic evidence, we agree with the district court that SIPCO in creating Plan 1006 and Plan 1017 intended that retirement medical benefits for salaried employees would vest when those employees retired. To put the issue in trust law terms, either the reservation-of-rights provisions in the plan documents must be construed as conferring only a power to modify plan benefits prospectively (that is, for salaried employees not yet retired),[3] or SIPCO relinquished the broader power to modify benefits for those already retired. In most ERISA welfare benefit plans, a reservation-of-rights provision would reflect the employer's intent to make plan benefits non-vested. But here the provisions are not free of ambiguity, and plaintiffs have proved that SIPCO, in creating the Plans, did not have that intent.

III.

As may be apparent from the foregoing discussion, we disagree with the emphasis that plaintiffs and the district court placed on SIPCO's pre-1989 SPDs. Adequate disclosure to employees is one of ERISA's major purposes. Recognizing that employee benefit plans are usually lengthy and highly technical documents, Congress required plan administrators to furnish SPDs to each plan

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[3] The extent of a power to modify a trust depends upon the terms of the trust and therefore the intent of the settlor. *See* IV William F. Fratcher, *Scott on Trusts* § 331, at p. 382 (4th ed. 1989).

participant and beneficiary. *See* 29 U.S.C. § 1022(a)(1). Congress also stated very specifically what an SPD must contain:

> (b) The plan description and summary plan description shall contain the following information: . . . a description of the provisions providing for nonforfeitable pension benefits; circumstances which may result in disqualification, ineligibility, or denial or loss of benefits. . . .

29 U.S.C. § 1022(b). In other words, a pension plan SPD *must* disclose its vesting terms, but a welfare plan SPD is not required to disclose that plan benefits are not vested. Rather, § 1022(b) only expressly requires that a welfare plan SPD specify those circumstances in which an individual beneficiary is not entitled to benefits otherwise provided by the present terms of the plan. *See Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 935 (5th Cir.) ("Section 1022(b) relates to an individual employee's eligibility under then existing, current terms of the Plan and not to the possibility that those terms might later be changed, as ERISA undeniably permits."), *cert. denied*, ___ U.S. ___, 114 S.Ct. 196, 126 L.Ed.2d 154 (1993). The "TERMINATION OF COVERAGE" provisions of SIPCO's pre-1989 SPDs contained this limited type of § 1022(b) disclosure.

The Department of Labor, which is responsible for interpreting and enforcing ERISA, has promulgated detailed regulations specifying the disclosure requirements for SPDs. *See* 29 C.F.R. §§ 2520.102-1 to -5, .104b-1 to -4. Nowhere do these regulations require that a welfare plan SPD specifically disclose that its benefits are not vested. That these benefits need not be vested was one of

the most important legislative decisions reflected in ERISA. Given the importance of this issue and the Department's thorough approach to questions of disclosure, its failure to require SPDs to disclose non-vesting cannot be an inadvertent omission. Therefore, giving appropriate deference to the Department's interpretation of § 1022(b), we conclude that the failure to disclose that a welfare plan's benefits are not vested is neither a material misrepresentation nor a breach of the plan administrator's fiduciary duties. *Accord Wise*, 986 F.2d at 936-38.

Plaintiffs argue that the silence of the SIPCO SPDs on the question of vesting overrides any specific plan provisions stating that SIPCO reserved the right to amend or terminate benefits. Because of the importance of disclosure to the statutory regime, an SPD provision prevails if it conflicts with a provision of a plan. *See, e.g., Aiken v. Policy Management Sys. Corp.*, 13 F.3d 138, 140-41 (4th Cir.1993). However, this rule of construction does not apply when the plan document is specific and the SPD is silent on a particular matter. "While clear and unambiguous *statements* in the summary plan description are binding, the same is not true of silence." *Wise*, 986 F.2d at 938.

This does not mean that the silence of SIPCO's pre-1989 SPDs on the question of vesting is irrelevant in construing the Plans. As our prior discussion makes clear, those SPDs were a significant factor in discerning SIPCO's intent regarding the issue of vesting. However, the SPDs are simply part of that interpretive landscape. We do not affirm the district court's material misrepresentation and breach of fiduciary duty holdings.

Nor do we agree with the district court's equitable estoppel conclusion. Plaintiffs argue that communications and promises made by SIPCO and Monfort to employees may be the basis for invoking equitable estoppel. Although we have left open the question whether equitable estoppel will ever give rise to an ERISA claim, we have held that an ERISA plaintiff may not use equitable estoppel to recover money damages for reliance on an "extra-contractual promise." *Slice v. Sons of Norway*, 34 F.3d 630, 632 (8th Cir.1994).[4] This would appear to bar plaintiffs' equitable estoppel claims for additional benefits.

Moreover, even assuming that the doctrine applies, courts recognizing estoppel in ERISA cases require proof of a material misrepresentation on which the participant or beneficiary has reasonably relied to his detriment. *See Black v. TIC Inv. Corp.*, 900 F.2d 112, 115 (7th Cir.1990). Most courts have held that ERISA precludes oral or informal amendments to a plan, by estoppel or otherwise. *See National Cos. Health Benefit Plan v. St. Joseph's Hosp.*, 929 F.2d 1558, 1572 & n. 13 (11th Cir.1991); *Hozier v. Midwest Fastners, Inc.*, 908 F.2d 1155, 1163-64 (3d Cir.1990); *Moore*, 856 F.2d at 492. *See also Anderson v. John Morrell & Co.*, 830 F.2d 872, 877 (8th Cir.1987). SIPCO's pre-1989 SPDs may not be the basis for an estoppel – they were merely silent with regard to SIPCO's reservation of the right to modify

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[4] *See also McGee v. Funderburg*, 17 F.3d 1122, 1126 (8th Cir.1994); *Farley v. Benefit Trust Life Ins. Co.*, 979 F.2d 653, 659-60 (8th Cir.1992); *Landro*, 625 F.2d at 1352, 1355 (pre-ERISA case applying Minnesota law). Nor may equitable estoppel be applied so as to jeopardize the soundness of a funded ERISA plan. *See Phillips v. Kennedy*, 542 F.2d 52, 55 n. 8 (8th Cir.1976).

or terminate benefits, and they expressly notified interested participants and beneficiaries that they could obtain and examine all Plan documents, as required by the Department's regulations. *See* 29 C.F.R. § 2520.102-3(t)(2). At a minimum, these considerations demonstrate that, if estoppel is an available doctrine, it must be applied with factual precision and therefore is not a suitable basis for class-wide relief. *See Cooke v. Manufactured Homes, Inc.*, 998 F.2d 1256, 1261 n. 5 (4th Cir.1993); *Anderson v. Alpha Portland Industries*, 836 F.2d at 1520.

The district court correctly concluded that SIPCO intended to and did provide the plaintiff Class with vested retiree medical benefits. Accordingly, its judgment is affirmed.

Fred G. JENSEN, James J. Monahan, Walter C. Clark, and Richard F. Kriegler, on behalf of themselves and all others similarly situated, Plaintiffs.

v.

SIPCO, INC. and Monfort, Inc., Defendants.

No. C 89-4068.

United States District Court,
N.D. Iowa,
Western Division.

Aug. 6, 1993.

Retirees filed class action under the Employee Retirement Income Security Act (ERISA) against two employers, seeking unchanged lifetime medical benefits which they claimed were promised to the class. The District Court, Donald E. O'Brien, Senior District Judge, held that: (1) employers were estopped from adding reservation-of-rights language to summary plan descriptions, and terminating or reducing benefits pursuant to such reservation, where retirees relied on language found in original summary plan descriptions at time of their retirement which did not reserve to employers right to terminate or change benefits, and (2) employers breached their fiduciary duties to retirees by failing to properly disclose terms of plan in summary plan descriptions, including in particular failure to disclose claimed reservation of right to amend or terminate benefits as set forth in underlying plan documents.

Judgment for plaintiffs.

Affirmed 38 F.3d 945.

James C. Hanks, Steven C. Kohl and Percy L. Nymann, Sioux City, IA, for plaintiffs.

Richard J. Barry, Spencer, IA, William H. Bruckner, Houston, TX, Roger J. Miller and Randal M. Limbeck, Omaha, NE, for defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

DONALD E. O'BRIEN, Senior District Judge.

This matter comes before the court following a trial to the bench. Four retirees filed a class action under the Employee Retirement Income Security Act of 1974 as amended, 29 U.S.C. § 1001, *et seq.* (ERISA), against two corporate defendants. The four plaintiffs, retirees, seek unchanged lifetime medical benefits they claim the class was promised.

This case revolves around a single issue: Does ERISA permit an employer to revise summary plan descriptions for welfare plans by adding reservation-of-rights language so as to conform summary plan description language with plan document language? After considering relevant case law, the briefs of the parties, the witnesses' testimony, and other relevant evidence, the court finds that an employer is permitted to do so under ERISA; however, an employer may not change benefits to those class members who have already retired, relying on the

language found in their Summary Plan Description at the time of their retirement.

FINDINGS OF FACT[1]

1. This action was filed on July 21, 1989, under the ERISA, 29 U.S.C. § 1132(a)(1)(B), to recover benefits due, to enforce rights, and to clarify rights to present and future benefits under the terms of an employee welfare benefit plan.

2. This court has jurisdiction pursuant to 29 U.S.C. § 1132(e).

3. Venue for this action is proper in the Northern District of Iowa.

4. A copy of the complaint herein has been served on the Secretary of Labor and the Secretary of the Treasury pursuant to 29 U.S.C. § 1132(b).

5. Pursuant to this court's Order of December 11, 1989, this action is certified as a class action under Federal Rule of Civil Procedure 23(b)(2).

6. Pursuant to this court's class certification order, the class represented by named plaintiffs Fred G. Jensen, James J. Monahan, Walter C. Clark, and Richard F. Kriegler is certified as consisting of all retired salaried employees of SIPCO, Inc., formerly known as Swift Independent Packing Company, who retired on or before March 1, 1989 and their eligible dependents.

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[1] Findings of Facts numbered 1 through 40 were stipulated to in the pretrial order.

7. The class contains approximately 800 people.

8. Named plaintiffs are retirees who worked as salaried employees at several of defendant SIPCO, Inc.'s plants, offices, and other locations.

9. SIPCO is also known as Swift Independent Packing Company. A reference to one name is a reference to the other name.

10. Plaintiff Fred G. Jensen is a resident of Weld County, Colorado. Mr. Jensen was employed by defendant SIPCO, Inc. for approximately 39 years until his July 1, 1987 retirement. Jensen was controller of the Glenwood Iowa plant at the time of its August 1, 1985 closing, and worked at several other SIPCO plants, including the Sioux City, Iowa plant.

11. Plaintiff James J. Monahan is a resident of Marshall County, Iowa. Mr. Monahan was employed by SIPCO and its predecessors for over 36 years. At the time of his retirement in early 1989, he was controller of SIPCO's Marshalltown, Iowa plant.

12. Plaintiff Walter Clark is a resident of Polk County, Iowa. Mr. Clark was employed by SIPCO and its predecessors for 40 years. Just prior to the time of his retirement, Mr. Clark was controller of SIPCO's Des Moines, Iowa plant.

13. Plaintiff Richard F. Kriegler is a resident of Sioux City, Woodbury County, Iowa. Mr. Kriegler was employed by SIPCO for 33 years until his retirement in September of 1985. At the time of his retirement, he was employed as the plant superintendent at SIPCO's Sioux

City, Iowa plant. Mr. Kriegler resides within the Northern District of Iowa.

14. At all times relevant to this action, defendants have done business within the state of Iowa. The United States District Court for the Northern District of Iowa has jurisdiction of the subject matter and the parties.

15. Prior to the filing of the Complaint herein, defendant SIPCO established the Swift Independent Packing Company (now known as SIPCO) Medical Plan for Salaried Pensioners. Currently such benefits are provided through three plans:

1). "SIPCO, Inc. Medical Plan – Plan 1006" – for salaried pensioners retiring on or after January 1, 1979 (Plan 1006).

2) "SIPCO, Inc. Medical Plan – Plan 1017" – for salaried pensioners retiring on or after January 1, 1987 (Plan 1017).

3) "SIPCO, Inc. Medical Plan – Plan 1018" – for salaried pensioners retiring on or after January 1, 1989 (Plan 1018).

16. Defendant SIPCO has created and currently maintains a trust, the Swift Independent Packing Company Medical Benefit for Pensioners Trust, to fund medical benefit plans for both non-salaried and salaried retirees.

17. Class members are persons presently receiving pension and other retirement benefits, including health insurance benefits under either Plan 1016, Plan 1017, or Plan 1018 (the Plans). As such, plaintiff class members are "participants" and "beneficiaries" under the Plans within the meaning of 29 U.S.C. §§ 1002(7) and 1002(8). The

health insurance benefits which are the subject of this lawsuit and provided for in Plans 1006, 1017, and 1018 are provided pursuant to an "Employee Bénefit Plan" within the meaning of ERISA, 29 U.S.C. §§ 1002(1) and 1002(3).

18. Defendant SIPCO, Inc. (SIPCO) is an employer within the meaning of 29 U.S.C. § 1002(5) of ERISA and operated a meatpacking plant within the Northern District of Iowa at pertinent times involved herein.

19. Defendant Monfort, Inc. (Monfort) is an employer within the meaning of 29 U.S.C. § 1002(5) of ERISA and operated a meatpacking plant within the Northern District of Iowa at pertinent times involved herein.

20. Defendant SIPCO is a "sponsor" and "administrator" and "fiduciary" of the three plans at issue pursuant to 29 U.S.C. §§ 1002(16) and 1002(21)(A).

21. Defendant Monfort is a "sponsor" and "administrator" and "fiduciary" of the three plans at issue pursuant to 29 U.S.C. §§ 1002(16) and 1002(21)(A).

22. In an August 10, 1988 letter, Ken Monfort, an employee and representative of both defendants, announced that the SIPCO retiree health care plan would be abolished for those salaried employees who did not retire prior to February 27, 1989. This date was later changed to March 1, 1989 in a November 21, 1988 memorandum. *See* Stipulated Facts, Pretrial Order ¶ I.T.

23. Prior to January of 1989, none of the Summary Plan Descriptions ("SPD") for the three plans at issue

contained any reservation of any right to terminate, discontinue, alter, modify, or change the plans.

24. Prior to January of 1989, the SPDs contained the following language dealing with termination of coverage:

> TERMINATION OF COVERAGE
>
> Children Who Marry or Reach Age 19 –
>
> All coverage for children ceases on date of marriage or age 19, whichever occurs first.
>
> Divorce of a Spouse –
>
> All coverage for the spouse ceases on the date of the divorce.
>
> Death of a Pensioner –
>
> Coverage for dependents continues for a period of 90 days following date of death and then ceases.

No other language regarding the right to terminate, discontinue, alter, modify, or change the Plans appeared in those SPDs.

25. Around January 1989, plaintiff class members who were receiving health care benefits pursuant to Plans 1006 and 1017 received new SPDs for both plans. Among other changes, for the first time the following language appeared on page 1 of the new SPDs for both plans:

> SIPCO, Inc. reserves the right to terminate, discontinue, alter, modify, or change this Plan or any provision of this Plan at any time.

26. The new SPDs for Plans 1006 and 1017 also added language stating that when provisions of the SPD

conflict with those of the Plan and Trust documents, the Plan and Trust documents are controlling.

27. Along with a letter dated April 21, 1989, plaintiff class members who had retired on or after January 1, 1989 and their eligible dependents received a new SPD concerning an entirely new plan entitled "SIPCO, Inc. Medical Plan – Plan 1018" (Plan 1018). This new SPD also contained the "right to terminate or modify" and "plan controls" language first appearing in the new 1989 versions of the SPDs issued for Plans 1006 and 1017.

28. The SPD Plan 1017 also contained benefit changes when compared with the SPD for Plan 1017 in effect prior to January 1, 1989.

29. Prior to May 11, 1990, SIPCO had advised those persons who became surviving spouses of retirees that they had health benefits for their lifetime or until their remarriage. During that week, the fact that such letters were being sent out came to the attention of defendants' counsel. Thereafter, the sending of such letters was terminated, and new letters were sent to approximately 50 surviving spouses. These new letters did not advise the surviving spouse that the previous letters they had received were in error with regard to the continuation or duration of their health benefits.[2]

30. In April 1981, Swift Independent Corporation, also known as SIPCO, Inc., was spun off from Esmark, Inc. when approximately 65% of SIPCO's shares were sold to the public.

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[2] These letters to widows further demonstrate the extent of the "promises" made by the defendants.

31. After SIPCO, Inc. was formed, it established Plan 1006 for its salaried retirees. Plan 1006 was the same plan that Esmark had in effect for salaried retirees of Swift & Company. On April 1, 1981, the date of the spin-off of SIPCO from Esmark, Esmark established a trust to fund salaried pensioners accrued health care liabilities under Plan 1006. On August 12, 1981, SIPCO established Swift Independent Packing Company Medical Benefit for Salaried Pensioners Trust.

32. On January 1, 1984, Plan 1017 for certain salaried employees became effective.

33. On or about May 1987, ConAgra, Inc. acquired Monfort, Inc.

34. On September 28, 1987, ConAgra, Inc. acquired a 50% interest in SIPCO, Inc.

35. On or about February 1, 1988, the headquarters of SIPCO, Inc. was moved from Dallas, Texas to Greeley, Colorado. Since February 1, 1988, Monfort, Inc. has rendered management services for SIPCO, Inc. and leased office space to SIPCO, Inc.

36. At all times material after September 28, 1987, Monfort, Inc.'s operations were part of the ConAgra Red Meat Companies. Until August 1, 1989, Kenneth Monfort was president of this operating division. He was succeeded by the current president, Richard Monfort.

37. At all times material after September 28, 1987, SIPCO, Inc.'s operations were part of the ConAgra Red Meat Companies. Until August 1, 1989, Kenneth Monfort was president of this operating division. He was succeeded by the current president, Richard Monfort.

38. Certain persons who are officers of Monfort, Inc. have been SIPCO, Inc. officers since on or after September 28, 1987.

39. In August 1988, ConAgra, Inc. acquired the remaining 50% of the stock of SIPCO, Inc.

40. Since September 28, 1987, ConAgra, Inc. and Monfort, Inc. have provided administrative services to SIPCO, Inc. in connection with the administration of its pension plans and related pensioner medical plans.

41. In an August 10, 1988 letter, as an inducement for some of the current class members to retire, defendants announced that the SIPCO Retiree Health Care Plan for Salaried Employees would be abolished for those employees who did not retire prior to February 27, 1989. Several class members, as a result of that inducement, did in fact retire in reliance on that letter. Class members were promised that if they selected the joint and survivor annuity, their spouses would also have benefits for life. Retirees relied on those promises and those promises were confirmed in writing by over 50 letters in evidence (Oral testimony of all class members and Plaintiffs' Exhibits 129 through 179). Many of these employees would not have retired ahead of the deadline if they knew it could be changed later.

42. Defendant Monfort has exercised and continues to exercise management control of SIPCO and of the three SIPCO Plans at issue herein.

Numerous oral promises were made to the class members that upon retirement, they would be entitled to medical and hospital benefits for life that would not be

changed. For example, John Copeland, President, C.E.O., and Chairman of the Board of Swift from 1981 to 1986, testified as a member of the class and stated that our practice was to tell new employees that they and their spouses were covered for life and that that helped us recruit good people.

> Our policy was, we would not change the benefits. As CEO I said and felt that we (the company) could not change or cancel the medical for retirees. When Esmark took over, I was there and our policy was the same. The medical could be changed before they retired, but not after. While I was there, I ordered any such proposed changes dropped. Our employees relied on this position.

Fred Jensen, a member of the class, testified that he was comptroller and that part of his duties included instructing retirees at "exit" interviews. "I conducted about 70 such interviews and told the retirees that both they and their spouses had lifetime medical coverage not subject to change."

Walter Clark, a named class representative, supported all of the above set out statements of Copeland and Jensen and said, "exhibit 7 is the booklet I had when I retired. I selected to have my wife covered. I took a 17% reduction in pension. I want the plan I retired on back." There is no question his pension was for life. It is clear his medical benefits also were for life.

The court did not consider the testimony of class members Al Stuart and Roy Schafer because they clearly violated the sequestration of witnesses order.

CONCLUSIONS OF LAW

The primary method by which an employer communicates to its employees in regard to a welfare plan is through Summary Plan Descriptions (SPDs). *Moore v. Metropolitan Life Ins. Co.*, 856 F.2d 488, 492 (2d Cir.1988).

The contents of a SPD and the language used to communicate the contents are carefully prescribed by regulation. 29 C.F.R. § 2520.102-3(*l*).

The SPD must contain a description of the "circumstances which may result in disqualification, ineligibility, or denial or loss of benefits." 29 U.S.C. § 1022(b).

The SPD "must not have the effect of misleading, misinforming or failing to inform participants and beneficiaries" with respect to pertinent divisions of the plan. 29 C.F.R. § 2520.102-2(b).

If the SPD does not contain a benefit forfeiture clause, then such a forfeiture will not be enforced against a participant. *Hillis v. Waukesha Title Co., Inc.*, 576 F.Supp. 1103, 1109 (E.D.Wis.1983); *Eardman v. Bethlehem Steel Corp.*, 607 F.Supp. 196, 209-214 (W.D.N.Y.1984).

If there is a conflict between the Plan documents and the SPD, "the summary plan shall govern." *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir.1988); *McKnight v. Southern Life & Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir.1985), *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir.1984).

I. EQUITABLE ESTOPPEL.

One of the claims of the plaintiffs is that of equitable estoppel. The elements of equitable estoppel are:

> To establish estoppel, the party asserting estoppel must show: (1) a misrepresentation or concealment of material facts by the other party, (2) lack of knowledge of the true facts by the party to whom the misrepresentation is made, (3) an intent to cause reliance on the misrepresentation, and (4) actual reliance on the misrepresentation to the detriment of the party to whom the representation is made.

International Harvester Credit Corp. v. Leaders, 818 F.2d 655 (8th Cir.1987).

Under this claim plaintiffs assert that the representations set forth in the exhibits establish their right to a fixed level of benefits pursuant to a theory of equitable estoppel. Plaintiffs argue that the evidence shows that defendants' representations induced plaintiffs to believe that welfare benefits would be unchanged and would remain unchanged in retirement. The plaintiffs claim that these representations were such that defendants expected or should have expected that they would induce action or forbearance by plaintiffs. In reliance on those promises, plaintiffs provided services for defendants, then retired and did not look for other employment.

Defendants argue that no promise of lifetime benefits or benefits vested upon retirement. Therefore, the defendants argue that the key ingredient of promise is missing in the estoppel claim. Defendants further argue that ERISA does not recognize a claim for estoppel.

As the law of ERISA emerges, one fact remains constant, parties in ERISA suits will continue to dispute which common law claims have been preempted and those which have not. As Chief Judge Waters notes in *Fitch v. Arkansas Blue Cross and Blue Shield*, 795 F.Supp. 904, 906 (W.D.Ark.1992), "in recent years the issue of whether state law principles of estoppel apply to an ERISA governed employee benefit plan has been the subject of numerous reported decisions". After a careful and through review of the case law Judge Waters concludes that an estoppel claim would be recognized by the Eighth Circuit Court of Appeals in some circumstances. In reaching his decision Chief Judge Waters states:

> It has also been noted that the language contained in 29 U.S.C. section 1132(a)(3) allowing a participant or beneficiary to bring a civil action to "obtain other appropriate equitable relief" evidences Congress's intent that federal courts fashion federal common law. *Law v. Ernst & Young*, 956 F.2d 364, 369 (1st Cir.1992) (*citing, Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134, 156, 105 S.Ct. 3085, 3097, 87 L.Ed.2d 96 (1985) (Brennan, J. concurring in judgment)). Additionally, a line of case law exists that imposes liability upon reliance on misstatements or errors in the summary plan description, even when the misstatements conflict with the plan itself. *See e.g. Edwards v. State Farm Mut. Auto Ins. Co.*, 851 F.2d 134 (6th Cir.1988).

Fitch at 906-07.

Serious doubts have been expressed over the extension of plan eligibility through estoppel and the courts

have placed various limitations on the use of these principals [sic]. *Fitch* at 907. One of the main reasons for this apprehension is the desire to protect the actuarial soundness of benefit plans. This concern is not as much a factor in the case at bar since the benefit plans here are self insured as well as supplemented by a trust set up by previous owners of the companies. (Findings of Fact No. 16 and 31). The defendants admit there is some 6 to 8 million dollars in said trust. Sipco indicated these funds are "in reserve" available to retirees for medical care. The defendants want no further responsibility after those funds run out.

The Court of Appeals for the Eleventh Circuit has held that claimants cannot succeed on estoppel arguments based on oral modifications of employee benefits plans. *Nachwalter v. Christie,* 805 F.2d 956 (11th Cir.1986). However, courts are allowed to fashion a common law equitable estoppel in cases involving oral interpretations of ambiguities in such plans. *Kane v. Aetna Life Insurance,* 893 F.2d 1283, 1285-86 (11th Cir.1990), *cert. denied,* 498 U.S. 890, 111 S.Ct. 232, 112 L.Ed.2d. 192 (1991); *See also Greany v. Western Farm Bureau Life Ins. Co.,* 973 F.2d 812, 820-23 (9th Cir.1992).

The elements of federal common law equitable estoppel are: (1) the party to be estopped misrepresented material facts; (2) the party to be estopped was aware of the true facts; (3) the party to be estopped intended that the misrepresentation be acted on or had reason to believe the party asserting the estoppel would rely on it; (4) the party asserting the estoppel did not know, nor should it have known, the true facts; and (5) the party asserting the estoppel reasonably relied on the misrepresentation.

National Companies Health Benefit Plan v. St. Joseph's Hospital, 929 F.2d 1558, 1572 (11th Cir.1991). *See also Heckler v. Community Health Services*, 467 U.S. 51, 59, 104 S.Ct. 2218, 2223-24, 81 L.Ed.2d 42 (1984).

After a review of the above listed factors the court finds that all factors are present. First, Monfort and SIPCO did fail to include the reservation of rights in the SPDs. These actions resulted in a misrepresentation of material facts. Second, Monfort and SIPCO were aware of the true facts because they put the "magic words" in the underlying plan documents. Third, Monfort and SIPCO intended that the misrepresentation be acted upon or had reason to believe the retirees here would rely on the misrepresentation as evidenced by Ken Monfort's letter set out in Finding of Fact No. 41. Fourth, under ERISA an SPD must contain any termination or modification language. SIPCO Plans 1006, 1017, and 1018 as originally written were silent in this regard. Fifth, as a matter of law, plaintiffs were unaware of the right to terminate, amend, or modify the plan because the SPDs were silent as to this reservation of right.

In *Maxa v. John Alden Life Ins. Co.*, 972 F.2d 980, 984 (8th Cir.1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 1048, 122 L.Ed.2d 357 (1993) the court found that ERISA sets forth the relevant requirements for a proper summary plan description in the following terms:

> **Section 1022. Plan description and summary plan description**
>
> (a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries * * * The summary plan description shall include the information

> described in section (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan * * *
>
> * * *
>
> (b) The plan description and summary plan description shall contain the following information: * * * circumstances which may result in disqualification, ineligibility, or denial or loss of benefits * * *

29 U.S.C. section 1022(a)(1), (b) (1975). Pursuant to 29 U.S.C. section 1135, the Secretary of Labor is empowered to prescribe necessary regulations and forms. Pursuant to that power, regulations promulgated by the Secretary state that:

> (a) Method of presentation. The summary plan description shall be written in a manner calculated to be understood by the average plan participant and shall be sufficiently comprehensive to apprise the plan's participants and beneficiaries of their rights and obligations under the plan. In fulfilling these requirements, the plan administrator shall exercise considered judgment and discretion by taking into account such factors as the level of comprehension and education of typical participants in the plan and the complexity of the terms of the plan. Consideration of these factors will usually require the limitation or elimination of technical jargon and of long, complex sentences, the use of clarifying examples and illustrations, the use of clear cross-references and a table of contents.

> (b) General format. The format of the summary plan description must not have the effect of misleading, misinforming, or failing to inform participants and beneficiaries. Any description of exceptions, limitations, reductions, and other restrictions of plan benefits shall not be minimized, rendered obscure, or otherwise made to appear unimportant. Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the benefits or minimizing the limitations. The description or summary of restrictive plan provisions need not be disclosed in the summary plan description in close conjunction with the description or summary of benefits, provided that adjacent to the benefit description, the page on which the restrictions are described is noted.

29 C.F.R. § 2520.102-2(~~a);~~ (b) (1988).

In these plans – SIPCO, Inc. Medical Plan – Plan 1006, Plan 1017, and Plan 1018 – the restrictions were not minimized; they were nonexistent (not mentioned).

While a plan's summary may be easily understood, it does not fully comply with ERISA if it is not an accurate interpretation of the ~~original~~ pension plan. *McKnight v. Southern Life and Health Ins. Co.* 758 F.2d 1566, 1570 (11th Cir.1985). It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document and then claim that

any inconsistencies will be governed by the voluminous and complex plan. Unfairness will flow to employee for reasonably relying on the summary booklet. *Edwards v. State Farm Mut. Auto. Ins. Co.*, 851 F.2d 134, 136 (6th Cir.1988) (quoting *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir.1985)). *See also Hansen v. Continental Insurance Co.*, 940 F.2d 971, 982 (5th Cir.1991); *Pierce v. Security Trust*, 979 F.2d 28 (4th Cir.1992); *Govoni v. Bricklayers, Masons & Plasterers*, 732 F.2d 250, 252 (1st Cir.1984) (reliance or prejudice from faulty plan summary is ground for relief); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir.1984) (misleading summary plan description, combined with misleading management representations, preclude summary judgment in favor of employer); *Hoefel v. Atlas Tack Corp.*, 581 F.2d 1, 3 (1st Cir.1978) (enforcing summary of retirement plan) *cert. denied*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979); *Genter v. Acme Scale and Supply Co.*, 776 F.2d 1180, 1185 (3d Cir.1985) (the summary plan description must not mislead, misinform or fail to inform participant and beneficiaries of the plan); *Hurd v. Hutnik*, 419 F.Supp. 630, 656-57 (D.N.J.1976) (despite disclaimer, summary plan statement governs).

Under ERISA, an employer must provide a summary plan description to participants which describes circumstances which may result in disqualification, ineligibility, or denial or loss of benefits, written in understandable form, which is sufficiently accurate and comprehensive to reasonably apprise participants and beneficiaries of their rights and obligations under the plan. *Arnold v. Arrow Transp. Co. of Delaware*, 926 F.2d 782 (9th Cir.1990). Employees are entitled to rely on descriptions contained

in summary benefits plan descriptions required by ERISA. Poor drafting of summary benefit plan description (as required by ERISA) may extend or enlarge coverage which would otherwise be unavailable. *Branch v. G. Bernd Co.*, 764 F.Supp. 1527, 1538 (M.D.Ga.1991).

There are other specific obligations placed on the employer by the Act. One of these obligations relates to the notification that must be afforded the plan participants of their rights under the plan. Congress felt that ERISA's predecessor legislation had failed to provide adequate notification of rights for the plan participants. The Senate report on the Act identified as a source of congressional concern the inadequacy of effective notice of the rights of the plan participants due to the technicalities and complexities of the predecessor's Act's language – language which was all too often misleading or incomprehensive. For expressions of these concerns in House and Senate reports, see H.R.Rep. No. 807, 93d Cong., 2d Sess. 60 (1974), reprinted in 1974 U.S.C.C.An. 4639, 4620, and S.Rep. No. 383, 93d Cong., 2d Sess. 18 (1975), reprinted in 1974 U.S.C.C.An. 4639, 4890, 4935. *Pierce v. Security Trust*, 979 F.2d 23 (4th Cir.1992).

The law is clear, if plan administrators fail to accurately represent the terms of an ERISA plan in an SPD, the undisclosed provisions are ineffective. The Code of Federal Regulations could not make this point clearer: "Such exceptions, limitations, reductions, or restrictions of plan benefits shall be described or summarized in a manner not less prominent than the style, captions, printing type, and prominence used to describe or summarize plan benefits. The advantages and disadvantages of the plan shall be presented without either exaggerating the

benefits or minimizing the limitations." 29 C.F.R. § 2520.102-2(b) (1988); *McKnight*, 758 F.2d at 1570; *Edwards*, 851 F.2d at 136. This court is persuaded, as set out in Findings of Fact ¶¶ 22, 23, 24, and 25, that Ken Monfort announced that he was going to abolish the retiree health care plan for those employees that did not retire despite the fact that none of the plans contained any reservation of right to terminate or alter the plans, and despite the fact that all the SPDs stated that the plans were good until the death of a pensioner, and that it was not until January of 1989 that the new SPDs contained the words SIPCO, Inc. reserves the right to terminate or change the plans. This just cannot be done to retirees who retired relying on the language of earlier SPDs.

Having found plaintiffs' claim for recovery meritorious under this theory of equitable estoppel, the court does not now need to address plaintiffs' claims under promissory estoppel.

II. FIDUCIARY DUTY.

A. Who Are Fiduciaries?

An "employer" is defined as any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employees acting for an employer in such capacity. 29 U.S.C. § 1002(5). Under that definition, both Monfort and SIPCO are employers.

A "fiduciary" is defined as:

> A person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting

> management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

Every plan must have at least one named fiduciary who has authority to control and manage the operation and administration of the plan. 29 U.S.C. § 1102(a)(1). In addition, under ERISA.

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets . . . or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A).

The term "fiduciary" should be broadly construed to effectuate the remedial purposes of ERISA. *See, e.g., Donovan v. Mercer,* 747 F.2d 304, 308-09 (5th Cir.1984). The statutory definition "includes persons who have authority and responsibility with respect to the matter in question, regardless of their formal title." *Id.* at 308 (quoting H.R. Rep. No. 1280, 93rd Cong., 2d Sess., *reprinted in* 1974 *U.S.Code Cong. & Ad. News,* 4639, 5038, 5103). The test is a functional one. *See, e.g., Blatt v. Marshall and Lassman,* 812 F.2d 810, 812 (2d Cir.1987). "[F]iduciary status exists with

respect to any activity enumerated in the statute over which the entity exercises discretion or control." *Id.*

Employers who sponsor the plan, the directors, officers or shareholders thereof, and plan administrators are among those parties who may be ERISA fiduciaries with respect to a plan, where they possess sufficient authority or control over the investment of plan assets or the administration of the plan. *See* R. Cooke, *ERISA Practice & Procedure* § 6.02 (1989 and 1991 Supp.); *United States Steel Corp. v. Commonwealth of Pa. Human Relations Comm'n*, 669 F.2d 124, 126-28 (3d Cir.1982) (employer is fiduciary when it was [sic] authority to alter terms of plan and authority to administer plan); *McNeese v. Health Plan Marketing, Inc.*, 647 F.Supp. 981, 983-85 (N.D.Ala.1986) (plan administrator who exercises discretionary control over administration of plan is fiduciary as to matters within its control).

A person is a fiduciary, however, only to the extent the person is engaged in functions which confer fiduciary status, i.e., when administrating the plan or investing its assets. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir.1988). Thus, an employer that is also an ERISA fiduciary is free to make its business decisions for business reasons, without regard to the collateral effect those decisions might have on contingent employee benefits. *Id.; Adams v. LTV Steel Mining Co.*, 936 F.2d 368, 370 (8th Cir.1991).

The Eighth Circuit has held that an employer may properly act in a dual capacity as both a plan fiduciary and an employer. *Hickman v. Tosco Corp.*, 840 F.2d 564, 566 (8th Cir.1988) (citations omitted). Consequently, if the employer acts only as an employer, ERISA's fiduciary

standards do not come into play. The statute has never prohibited an employer from acting in accordance with its non-fiduciary business interests when it is not acting to administer a plan or to invest plan assets. *Id.* Furthermore, ERISA has never required routine corporate business transactions, which may collaterally affect unaccrued and unvested employee benefits, to be performed solely in the interest of plan participants. *Sutton v. Weirton Steel Div. of National Steel Corp.*, 567 F.Supp. 1184, 1200-01 (N.D.W.Va.1983), *aff'd*, 724 F.2d 406, 411 (4th Cir.1983), *cert. denied*, 467 U.S. 1205, 104 S.Ct. 2387, 81 L.Ed.2d 345 (1984).

B. Breach of Fiduciary Duty: What Are Fiduciaries' Duties?

Another of the plaintiffs' claims is an alleged breach of fiduciary duty by the defendants. To recover on a claim for breach of fiduciary duty arising out of defendants' conduct with respect to a plan, plaintiffs are required to prove by a preponderance of the evidence:

(1) Defendants were fiduciaries with respect to the plan of which plaintiffs were participants or beneficiaries.

(2) Defendants breached their fiduciary duties.

(3) Plaintiffs' damages from the breach of the fiduciary duties.

See McNeese v. Health Plan Marketing, Inc., 647 F.Supp. 981, 983-87 (N.D.Ala.1986).

An ERISA fiduciary's duties are statutorily prescribed:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> (C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent and [sic] to do so; and
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this title and title IV.

29 U.S.C. § 1104(a)(1).

Misrepresentations or omissions of pertinent information in a fiduciary's communication with participants and beneficiaries regarding plan administration are breaches of the fiduciary duties recognized by ERISA. *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mutual Life Ins. Co.*, 698 F.2d 320, 326 (7th Cir.1983). "Lying is

inconsistent with the duty of loyalty owed by all fiduciaries and codified in § 404(a)(1) of ERISA, 29 U.S.C. § 1104(a)(1)." *Id.*

Although business decisions made by a fiduciary in a capacity other than its capacity as fiduciary cannot themselves be a breach of fiduciary duty, such a fiduciary must make no material misrepresentations regarding administration of the plan in connection with its business decisions. *Berlin v. Michigan Bell Tel. Co.*, 858 F.2d 1154, 1162-64 (6th Cir.1988); *Payonk v. HMW Industries, Inc.*, 883 F.2d 221, 225-26 (3d Cir.1989) (*Berlin* prohibits affirmative misrepresentations about rights under a plan affected by employer's business decisions).

A fiduciary's failure to act or pay benefits in accordance with plan documents is a breach of fiduciary duty. 29 U.S.C. § 1104(a)(1)(D). A fiduciary's failure to effectuate proper disclosure of the terms of the plan in the SPD is a breach of fiduciary duty. *See Genter v. Acme Scale & Supply Co.*, 776 F.2d 1180, 1183-86 (3d Cir.1985). A fiduciary's failure to notify participants and beneficiaries of a plan's financial problems, where they are apparent to the fiduciary is a breach of fiduciary duty. *See, e.g., McNeese v. Health Plan Marketing, Inc.*, 647 F.Supp. 981, 985-86 (N.D.Ala. 1986) (failure to notify participants of employer's delinquent contributions to pension fund); *Chambers v. Kaleidoscope, Inc. Profit Sharing Plan and Trust*, 650 F.Supp. 359, 377 (N.D.Ga.1986) (same).

In administering a plan, a fiduciary may not favor one group of plan participants over another. *Winpisinger v. Aurora Corp. of Ill., Precision Castings Div.*, 456 F.Supp. 559, 566 (N.D.Ohio 1978). Individual participants and

beneficiaries may not invoke 29 U.S.C. § 1109, through its civil enforcement provision, 29 U.S.C. § 1132(a)(2), as a basis to recover damages they suffered as a result of a breach of fiduciary duty. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 140, 105 S.Ct. 3085, 3089, 87 L.Ed.2d 96 (1985). This portion of ERISA only allows participants and beneficiaries, on behalf of the plan, to recover damages suffered by the plan; the recovery inures to the plan.

The court concludes that ERISA provides for a cause of action by individual participants and beneficiaries who are victims of an ERISA fiduciary's breach of fiduciary duty. *See Bartucca v. Katy Industries, Inc.*, 668 F.Supp. 111, 112-13 (D.Conn.1987). Recognition of such a cause of action is compelled by the plain language of 29 U.S.C. § 1132(a)(3), which authorizes an individual participant or beneficiary to bring a civil action "to enjoin *any act or practice* which violates *any provision* of this title or the terms of the plan, or . . . *to obtain other equitable relief . . . to redress such violations.*" 29 U.S.C. § 1132(a)(3) (emphasis added). Violation of § 1104 is an act which violates ERISA, and the remedy allowed in § 1132(a)(3) is in addition to the remedy allowed in § 1132(a)(2). A participant or beneficiary should not be required to prove damage to the plan in order to obtain relief to redress violations of ERISA.

The court notes that the Eighth Circuit Court of Appeals approved a damage award to a class of individual participants and beneficiaries for plan fiduciaries' breach of duty in *Monson v. Century Mfg. Co.*, 739 F.2d 1293 (8th Cir.1984). In addition, at least one federal district court has allowed an individual participant or beneficiary to sue a plan fiduciary for damages sustained by

the participant or beneficiary as a result of a breach of fiduciary duty under 29 U.S.C. § 1104. *See St. Mary Medical Center v. Cristiano*, 724 F.Supp. 732, 740 (C.D.Cal.1989) (assignee of participant's rights).

Therefore, plaintiffs are able as individual beneficiaries to bring a declaratory judgment action to have this court determine their rights under ERISA and these plans. Applying these standards to the present case, the court concludes based on the finings of fact that Monfort was a fiduciary with respect to the SIPCO plan. SIPCO was the administrator of the Plan and exercised discretionary authority and control with respect to every aspect of the management and administration of the Plan. Monfort was a fiduciary with respect to SIPCO's Plan because Monfort at all times controlled SIPCO.

A retiree medical benefit such as Plans 1006, 1017, and 1018 are welfare benefits under ERISA's definition. 29 U.S.C. § 1002(1). The court finds that welfare benefits are not vested under ERISA. Therefore, the court concludes that unlike pension benefits, Plans 1006, 1017, and 1018 are not subject to ERISA's mandatory vesting provisions. *See Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d 1512, 1516 (8th Cir. 1988), *cert. denied*, 489 U.S. 1051, 109 S.Ct. 1310, 103 L.Ed.2d 579 (1989); *Anderson v. John Morrell & Co.*, 830 F.2d 872, 876 (8th Cir.1987). Further, the Eighth Circuit does not recognize even an inference of an intent to vest such benefits. *Anderson v. Alpha Portland Industries, Inc.*, 836 F.2d at 1517. The court therefore holds that the plaintiffs here must bear the burden of demonstrating that welfare benefits are of a lifetime duration.

The only way welfare benefits can "vest" is by agreement or contract between the parties. *In re White Farm Equipment Co.*, 788 F.2d 1186, 1193 (6th Cir.1986).

After reviewing the evidence and considering the parties' testimony, the court concludes as a matter of law that SIPCO did agree to provide lifetime unchanged benefits to the plaintiffs' class (retirees). In reaching its conclusion, the court first reviewed the language of documents establishing Plans 1006, 1017, and 1018 as well as the SIPCO Trust document. After reviewing the underlying documents, the court concludes that the language in each of the underlying Master Plan documents expressly reserves SIPCO's right to amend or terminate each Plan. However, as noted above, the SPDs did not contain such language as was required by the Code of Federal Regulations. The court finds that SIPCO, if it was its intention to alter or terminate future medical benefits, could have easily informed the employees in its SPD as required by law. As noted above, as SIPCO did not expressly inform plaintiffs of its intentions as found in the underlying trust document, the court finds that it was SIPCO's intention at pertinent times to provide each of plaintiffs' class members with lifetime benefits.

The court also reviewed the SPDs for Plans 1006, 1017, and 1018. It finds that no reservation of rights was contained in any of the SPDs prior to January 1989. The defendants presented exhaustive evidence that each SPD set forth procedures that enabled participants of the Plan to inspect or obtain a copy of the underlying plan document, which did reserve SIPCO's right to terminate. The defendants presented further evidence indicating that no member of the class ever requested a copy of the Plan

document for Plans 1006 or the combined document for Plans 1006 and 1017 prior to the start of this litigation. The court finds this evidence to be irrelevant, as the Code of Federal Regulations (29 C.F.R. § 2520.102-2(a), (b) (1988)) specifically provides for SPDs to contain accurate representations of the underlying Plan in language understandable to every Plan participant and, as such, the court has no problem finding that an available review of the underlying Plan documents should not bar retirees in any way so as to affect this litigation.

The court concludes that defendants breached their fiduciary duties to plaintiffs by failing to properly disclose the terms of the Plan in the summary plan descriptions SIPCO, Inc. Medical Plan – Plan 1006; SIPCO, Inc. Medical Plan – Plan 1017; and SIPCO, Inc. Medical Plan – Plan 1018, including in particular the failure to disclose the claimed reservation of a right to amend or terminate as set forth in Article XVI.

The plaintiffs and class members are therefore entitled to a declaratory judgment and injunctive relief under 29 U.S.C. § 1132(a)(3) giving them unchanged lifetime medical benefits as promised prior to their retirement.

ORDER

The plaintiffs have prevailed on two of their theories, equitable estoppel and breach of fiduciary duty. Therefore,

IT IS HEREBY ORDERED THAT:

1. Defendants be permanently enjoined from terminating benefits or instituting any reduction in the benefits

provided under SIPCO, Inc. Medical Plan – Plan 1006 ("Plan 1006") and are further enjoined to permanently restore the health care benefits under said plan to the level of benefits provided to plaintiffs and class members as specified in the summary plan description for said plan issued in April 1981.

2. Defendants be permanently enjoined from terminating the benefits or instituting any reduction in the benefits provided under SIPCO, Inc. Medical Plan – Plan 1017 ("Plan 1017") and are further enjoined to permanently restore the health care benefits under said plan to the level of benefits provided to plaintiffs and class members as specified in the summary plan description for said plan issued in January 1984.

3. Defendants be enjoined to permanently provide health care benefits to those plaintiffs and class members who are receiving benefits under SIPCO, Inc. Medical Plan – Plan 1018 ("Plan 1018") which are identical to the health care benefits provided to the participants in Plan 1017 as specified in the summary plan description for Plan 1017 issued in January 1984.

4. Defendants be enjoined to issue summary plan descriptions for Plans 1006 and 1017 to all plan participants which delete therefrom the following language which appeared on page 1 of the summary plan description issued in January 1989:

> SIPCO, Inc. reserves the right to terminate, discontinue, alter, modify, or change this Plan or any provision of this Plan at any time.

5. Defendants be enjoined to issue summary plan descriptions to plaintiffs and class members who are

receiving benefits under Plan 1018 which are identical to the summary plan descriptions issued to participants in Plan 1017 in January 1984.

6. A declaratory judgment be entered obligating the defendants to provide the plaintiff class for the duration of all class members' lives with all benefits of the SIPCO Medical Plan for Salaried Pensioners described in the summary plan description as set forth in paragraphs 1-3 above.

7. The defendants' motion to dismiss is denied.

8. Counsel for the plaintiffs and class members shall make proper application for reasonable attorney fees, costs of prosecuting this action, court costs, and all other relief deemed necessary pursuant to 29 U.S.C. § 1132(g).

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MAR 3 1995
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No. 94-1360

In The

Supreme Court of the United States

October Term, 1994

SIPCO, INC., and MONFORT, INC.,

Petitioners,

v.

FRED G. JENSEN, JAMES J. MONAHAN, WALTER C. CLARK and RICHARD F. KRIEGLER, On Behalf of Themselves and All Others Similarly Situated,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Rule 15 of the Supreme Court Rules requires that a brief in opposition to a Petition for Writ of Certiorari point out any perceived misstatements in the Petition. Respondents believe that there are three misstatements contained in the Petition, one of which appears in the "Question Presented" section of the Petition.

The Question as presented implies that *all* plan documents contain a reservation of rights clause. Those are not the facts of this case. Summary Plan Descriptions (SPDs) are without question plan documents. And the SPDs in this case did not contain a reservation of rights clause until after all class members had retired.

With regard to the substance of the Question Presented, Respondents agree with the statement of the issue as framed by the Court of Appeals: "The core issue in this case is whether, when each class member retired, his or her SIPCO retirement medical benefits were vested."* (App. 7)

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* This is an issue of fact and a matter of contract and trust law.

RULE 29.1 LISTING

Respondents suggest to the Court that the statement that "SIPCO is no longer doing business" is evasive, if not in fact misleading.

Petitioners do not tell the court who has succeeded to either the business of SIPCO or the assets of SIPCO.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The second perceived misstatement is found in Petitioners' "Statement of the Case". At pages 4 and 5 of the Petition, Petitioners appear to quote the text of the reservation of rights language contained in the plan and trust documents (Article XVI (Power of Amendment)). The full text of Article XVI is set forth in the opinion of the Court

of Appeals (App. 5). Petitioners omitted that portion of Article XVI which is highlighted below in italicized type:

ARTICLE XVI

POWER OF AMENDMENT

1. The Board of Directors of the Company shall have the right and power to alter, amend, or annul any of the provisions of this Pensioner Medical Plan, *provided, however, that no such alteration, amendment or annulment shall permit any part of the Trust Fund, either corpus or income, to be used for or to be diverted to purposes other than for the exclusive benefit of the Employees or Participants or their beneficiaries.*

2. *An amendment shall become effective as of the date specified in the resolution adopting such amendment. Unless otherwise expressly provided therein, amendments shall not be applicable to persons who are receiving pensions hereunder prior to the effective date of such amendment.*

The omission of the italicized text leaves the Court with the incorrect perception that the employer's power to amend was unlimited. The italicized text demonstrates that that is clearly not the case.

Agreeing with the trial court, the Court of Appeals resolved the vesting of benefits issue by concluding "that SIPCO *intended* that its retiree medical benefits would vest when salaried employees retired" (emphasis supplied).

Thus, it is clear that the decisions of the trial court and the Court of Appeals are factually based so that none

of the reasons for a grant of certiorari as stated in Supreme Court Rule 10 are present in this case.

SUMMARY OF THE ARGUMENT

The decisions of the trial court are factually based. There were ambiguities in the plan documents. The issues decided by the courts below are issues of contract and/or trust law.

The attempted attack on the credibility of John Copeland at page 5 of the Petition demonstrates the factual nature of the opinions of the trial court and the Court of Appeals.

There is no conflict among the circuits as contended by Petitioners. The Petition for Writ of Certiorari should be denied.

ARGUMENT

I. The Plan Documents are Ambiguous

Citing *Alday v. Container Corp. of America,* 906 F.2d 660, 665 (11th Cir. 1990), *cert. denied,* 498 U.S. 1026, 111 S.Ct. 675, 112 L.Ed.2d 668 (1991) and *Moore v. Metropolitan Life Ins. Co.,* 856 F.2d 488, 492 (2d Cir. 1988), the Court of Appeals held that "SPDs are considered part of the ERISA plan documents" (App. 7). The Petitioners do not contend otherwise.

There were at least two sources of ambiguity in the plan documents which the lower courts were required to construe.

The first ambiguity pertains to the circumstances under which the benefits of the plan may be terminated. The SPDs contained provisions dealing with "Termination of Coverage" that were quite different from those set forth in the formal plan documents. The termination provisions in the SPDs read as follows:

> **TERMINATION OF COVERAGE**
>
> **Children Who Marry or Reach Age 19 –**
>
> All coverage for children ceases on date of marriage or age 19, whichever occurs first.
>
> **Divorce of Spouse –**
>
> All coverage for the spouse ceases on the date of divorce.
>
> **Death of Pensioner –**
>
> Coverage for dependents continues for a period of 90 days following date of death and then ceases unless the spouse is to receive a survivors pension. (App. 6)

These provisions make no reference whatsoever to the termination of coverage in the event the employer chooses to discontinue the plan.

On the other hand, the formal plan documents contained a reservation of the right to amend, alter, or annul *any provision of the Plan*. Significantly, this language does not specifically refer to the right to *terminate or discontinue* the plan. It was only after the members of the class retired that they were notified in writing of the

employer's asserted right to terminate or discontinue the plan. The insertion of this new termination language created the ambiguity and conflict which was, in the Petitioners' words, the "impetus for the class action" (Petition p. 4) and the basis for the decisions of both lower courts.

The courts were required to resolve the conflict between these competing provisions relating to the termination of coverage and did so by construing ambiguous terms in the documents.

The second source of ambiguity in the plan documents is derived from the reservation of rights language found in Article XVI and the reservation of rights clause belatedly inserted in the SPDs. While the reservation of rights provision which was inserted in the SPDs appears to declare an unlimited right to amend, the formal plan document contains very substantial limitations upon the power to amend:

1) No amendment shall permit any part of the Trust Fund to be used for any purpose other than the exclusive benefit of Participants.

2) Amendments shall only become effective on the date of such amendment.

3) Amendments shall not be applicable to persons who are receiving pensions prior to the date of such amendment.

On the basis of those inconsistent and ambiguous statements, the trial court and the Court of Appeals correctly held that the plan documents, including the SPDs, were ambiguous, or that at least they were not facially

unambiguous. The courts were accordingly justified in considering extrinsic evidence.

II. The Opinions were Factually Based and Decided on Contract Law or Trust Law

Having found the plan documents to be ambiguous the courts below correctly considered extrinsic evidence. In doing so, they relied on this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 112, 109 S.Ct. 948, 955, 103 L.Ed.2d 80 (1989), quoting *Restatement (Second) of Trusts* § 4 cmt.d (1959).[1]

The courts below then went on to consider extrinsic evidence set out briefly on pages 5 and 6 of the Petition and set out more completely in the Appellate Court's opinion at pages 10 to 13 of the Appendix to the Petition.

With respect to that evidence, the Appeals Court noted that:

1) "SIPCO has nothing to offer". App. 10.

2) "It did not include complete copies of Plan 1006 or Plan 1017 in the record on appeal". App. 10.

3) "SIPCO presented virtually no extrinsic evidence at trial supporting its position". App. 10.

---

[1] The third misstatement of the record in the Petition appears at App. 8 where the quotation from *Firestone, supra,* and the *Restatement* contains what may be a typographical error. But the error completely changes the meaning of the quotation. The last two words of that quotation as reproduced in the Appendix are "*now* inadmissible" and should read "*not* inadmissible".

4) "Plaintiffs . . . presented a wealth of extrinsic evidence supporting their contention that SIPCO intended that Plan 1006 and Plan 1017 medical benefits would vest when a Class member retired under either Plan." App. 10.

5) "Given this *overwhelming* extrinsic evidence, we agree with the District Court that SIPCO in creating Plan 1006 and Plan 1017 *intended* that retirement medical benefits for salaried employees would vest when those employees retired." (emphasis supplied) App. 13.

6) "To put the issue in trust law terms, either the reservation of rights provisions in the plan documents must be construed as conferring only a power to modify plan benefits prospectively (that is, for salaried employees not yet retired) or SIPCO *relinquished* the broader power to modify benefits for those already retired." (emphasis supplied) App. 13.

Clearly, this case has been decided on factual questions as a matter of contract or trust law.

Petitioners in their Petition seem to recognize that to be the case when they attempt to attack the credibility of John Copeland, a former SIPCO President and CEO. (See p. 5 of the Petition). Copeland's testimony had been relied upon heavily in the courts below.

But Rule 52 of the Federal Rules of Civil Procedure provides that:

> "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

The attempt to attack the credibility of John Copeland in the Petition accomplishes nothing except to underscore the factual basis of the opinions below.

III. This Decision is not in Conflict with Other Courts of Appeal

Petitioners strive mightily to create the impression that there is a conflict between the decision in *SIPCO* and decisions of other courts of appeal. But this Division of this Brief will demonstrate that there is no such conflict.

The conflict perceived by Petitioners is created primarily by their misperception and various misstatements of the facts of this case. Those misstatements have been pointed out earlier in this Brief.

At pages 10 and 11 of their Petition, Petitioners attempt to compare the reservation of rights language in this case with reservation of rights language in other circuit court cases.

But as shown in the Statement of the Case in this Brief, Petitioners have misstated the language in this case by severely abbreviating or editing the language in this case. When we look at the complete language of Article XVI, we find that it is very different from that of other circuit court cases.

In the first place the language in the SIPCO plan:

1) does *not* include the word "discontinued" as in *Gable v. Sweetheart Cup Co. Inc.*, 35 F.3d 851 (4th Cir. 1994).

2) does *not* include the word "cancel" as in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 196 (1993).

3) does not include the words "terminate", "suspend", or "withdraw" as in *Alday v. Container Corp. of America*, 906 F.2d 660 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 675 (1991).

4) does *not* include the words "discontinued" or "discontinue" as in *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S.Ct. 1745 (1989); and

5) does *not* include the word "discontinue" as in *Moore v. Metropolitan Life Insurance Co.*, 856 F.2d 488 (2d Cir. 1988).

In the second place there was no multi-million dollar trust fund created to satisfy the obligation to pay retiree medical benefits in the cases cited by Petitioners as there is in this case.

And, in the third place, the language in the SIPCO plan contains specific and substantial limitations on the power to amend (noted in Argument II in the discussion concerning Article XVI) for which there is no counterpart in the cases cited by Petitioners.

In none of those cases has the court of appeals held that the language of the reservation of rights clause was ambiguous. In none of those cases was the court concerned with an inconsistency between the formal plan documents and the SPDs, which helped create the ambiguity in *SIPCO*.

The Petitioners also failed to point out that all circuits are in agreement that if there is a conflict between the formal plan documents and the SPD, "the summary shall govern." *Hansen v. Continental Insurance Co.*, 940 F.2d 971 (5th Cir. 1991); *Edwards v. State Farm Mutual Automobile Ins. Co.*, 851 F.2d 134, 136 (6th Cir. 1988); *McKnight v. Southern Life and Health Ins. Co.*, 758 F.2d 1566, 1570 (11th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1224-25 (9th Cir. 1984); and *Heidgerd v. Olin Corp.*, 906 F.2d 903 (2nd Cir. 1990). As the court noted in *McKnight, supra:*

> "It is of no effect to publish and distribute a plan summary booklet designed to simplify and explain a voluminous and complex document, and then proclaim that any inconsistencies will be governed by the plan. Unfairness will flow to the employee for reasonably relying on the summary booklet."

758 F.2d at 1570. (This language is quoted in *Hansen, supra.)*

In *Hansen, supra,* the court noted the futility of any other rule by stating at pages 981 and 982:

> " . . . if a participant has to read and understand the policy in order to make use of the summary; then the summary is of no use at all."

Petitioners appear to rely heavily on *Wise, supra,* to establish their perception of a conflict in the circuits. But *Wise* is not in conflict with *SIPCO.* As shown above the language in the reservation of rights clause is different than in *SIPCO.* No ambiguity was found in *Wise.*

Additionally in *Wise*, the Plaintiff class was entirely different than the Plaintiff class in *SIPCO*. The class in *Wise* was a class of those persons retiring *after* the change in the SPDs. That class was a class of those who retired *after* the company announced it would provide benefits only to those retiring before March 1, 1986. In *SIPCO* the class is those persons who retired *before* a similar announcement. In *Wise*, the company continued to provide benefits to those who retired *prior* to March 1, 1986. *Wise*, 986 F.2d at 936.

Petitioners assert that *Schoonejongen v. Curtiss-Wright Corp.*, 18 F.3d 1034 (3d. Cir. 1994), *cert. granted*, 115 S.Ct. 42 (Sept. 26, 1994) (No. 93-1935), provides a reason for the grant of certiorari in this case.

But *Curtiss-Wright* presents an entirely different issue. The issue presented in *Curtiss-Wright* was a procedural question. The procedural question was whether the Plan provided a procedure for amending the Plan as required by § 402(b)(3) of ERISA (29 U.S.C. § 1102(b)(3)). Unlike the SPD in this case, the SPD in *Curtiss-Wright* did clearly and unambiguously provide a right to terminate the plan.

The issue in *SIPCO* is a factual issue. That issue was whether SIPCO *intended* that the benefits vest upon retirement. The courts below held, based upon overwhelming evidence, that SIPCO so intended.

CONCLUSION

None of the considerations for the grant of certiorari set forth in Supreme Court Rule 10 are present in this case. The Plan Documents taken together are ambiguous. The Courts below have resolved factual matters on overwhelming evidence. There is no conflict of Circuit Court decisions.

Accordingly, the Petition should be denied.

Respectfully submitted,

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